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No. 88- 1763

In The

Supreme Court of the United States

October Term, 1988

GERALDINE KOVEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the actions of the Federal Bureau of Investigation and/or the office of the United States Attorney for the District of New Jersey, in volitionally supplying the requisite interstate jurisdictional elements in order to "manufacture" federal jurisdiction amounts to a constitutionally impermissible usurpation of state jurisdiction, violative of the Tenth Amendment and contrary to both the legislatively and constitutionally delineated jurisdictional limits of the federal court system, thereby mandating dismissal of the underlying indictment?

2. Whether the failure of the trial judge to adequately and fairly charge the jury below [specifically: (i) by failing to state the requirements of N.J.S.A. 2C:11-3 (Murder-for-Hire), underlying each and every count of the indictment; and (ii) by repeatedly confusing the jury by alternately referencing violations of 18 U.S.C. § 1952 (of which the petitioner was *not* charged) and 18 U.S.C. § 1952A, and thereafter failing to attempt to rectify such error] is plain error mandating reversal of the judgment below?

3. Whether the petitioner's constitutional rights under the due process clause of the Fifth Amendment and the Eighth Amendment prohibition against cruel and unusual punishment were violated by the trial judge's erroneous application of the Federal Sentencing Guidelines and/or Federal Rules of Criminal Procedure 32(c)3(A) and 32(c)3(D) thereby mandating that the sentence be vacated and the matter remanded to the District Court with instructions for resentencing? Specifically:

- The trial judge's failure to acknowledge a number of significant, mitigating factors, probatively and competently presented on behalf of petitioner (*i.e.*, battered woman's syndrome; her need for psychiatric treatment, and the potential for

incarceration to irreversibly undermine progress in such treatment; prior leadership in community and family; post-incarceration unemployability, making post-release rehabilitation extremely difficult, if not impossible), and his refusal to depart from the sentencing range specified in the Federal Sentencing Guidelines, as provided in 18 U.S.C. § 3553(b);

• The trial judge's erroneous finding in refusing to grant the two point reduction provided by Chapter 3 of the Federal Sentencing Guidelines, Section 3E1.1 ("Acceptance of Responsibility"). U.S. Sentencing Commission Guideline Manual, Section 3E1.1, 197 (1988) (hereinafter, "Federal Sentencing Guidelines" and/or "Guidelines").

• The trial judge's noncompliance with the mandates of Federal Rules of Criminal Procedure 32(c)3(A) and 32(c)3(D) in failing to assure petitioner access to her presentence report at a reasonable time before the sentencing hearing and, after notice from both petitioner's counsel and petitioner that certain factual inaccuracies and/or direct falsities existed in the presentence report, failing to enter a finding of record on such alleged falsities (or to determine that no such finding is necessary because the matter will not be taken into account in sentencing) and thereafter expressly relying on certain of such falsities in rejecting petitioner's arguments for mitigating considerations and imposing sentence.

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counsel, on behalf of petitioner Geraldine Koven, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

There is no formal opinion of the District Court. Excerpts of the transcript of proceedings in that court, including the statements made by the District Court judge (i) in disposing of

the petitioner's motion for dismissal of the indictment on grounds of prosecutional misconduct and/or manufactured jurisdiction; (ii) in charging the jury; and (iii) at the sentencing hearing have been reproduced from the trial transcript and appear in Appendix C, *infra* at 24a-46a. The opinion of the Court of Appeals for the Third Circuit has not been reported. The two page judgment order affirming the judgment of the District Court without comment is reproduced as Appendix A, *infra* at 1a-2a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra,* 1a-2a) was entered on January 20, 1989. No petition for rehearing was filed in this matter. On March 20, 1989, Associate Justice William Brennan, Jr. extended the time within which to file a petition for a writ of certiorari to April 20, 1989 (Appendix E, *infra* at 62a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the following: Article III, Sections I.1 and II.1; Fifth, Eighth and Tenth Amendment.

The full text of the Amendments is set forth in Appendix B at page 10a; the full text of Article III, Sections I.1 and II.1 is found at pages 7-8 of the Petition.

The statutory provisions involved are set forth in Appendix B: 18 U.S.C. § 1254(1) appears at pages 10a-11a; 18 U.S.C. § 1952 appears at pages 11a-12a; 18 U.S.C. § 1952A appears at pages 12a-13a; 18 U.S.C. § 3553(b) appears at page 13a; and N.J.S.A. 2C:11-3 appears at page 16a-23a.

STATEMENT OF THE CASE

In enacting 18 U.S.C. § 1952A, Use of Interstate Commerce Facilities in the Comission of Murder-For-Hire (hereinafter, "Murder-for-Hire"), the Congress was acutely aware the federalism issues posed by the legislation and expressly instructed that it should *not* be used to usurp the traditional jurisdiction and responsibility of the several states. Rather, Congress derived the Murder-for-Hire statute to combat the professional contract killers employed by organized crime elements. Specific criteria which should be present to warrant federal intervention in a murder investigation (*i.e.*, type of defendants reasonably believed to be involved; lack of effective local investigative capacity because of interstate factors of crime) were specifically enumerated. S. Rep. No. 225, 98th Cong., 1st Sess. 305 (1983); U.S. Code Cong. and Admin. News, 3484 (1984). Testimony in the Senate hearings on the bill confirm that it was directed towards the prosecution of those crimes committed by organized criminal enterprises indentified by, among other things, formalized, corporate-like structures operating on an interstate basis. *See* Organized Crime and the Use of Violence: Hearings Before the Permanent Subcomittee on Investigations of the Senate Committee on Governmental Affairs, 96th Cong., 2d Sess. 17-19 (1980).

Geraldine Koven, the petitioner herein, was arrested on February 19, 1988. On February 24, 1988 a federal grand jury returned a nine count indictment against her. A redacted indictment containing seven of the original nine counts (two counts being dismissed on the Government's motion) was filed on May 2, 1988. The indictment charges six counts of "knowingly and willfully using and/or causing another to use a communication facility with the intent that a murder be committed as consideration for a promise and agreement to pay money", and one count of "knowingly and willfully using the United States mail with the intent that a murder be committed as consideration for a promise

to pay money'' in violation of the Murder-for-Hire statute. The trial on these charges, before the Honorable Nicholas H. Politan, commenced on May 2, 1988 and was submitted to the jury on May 16, 1988. On May 17, 1988, the jury returned a verdict convicting petitioner on each of the seven counts of the redacted indictment.

Sentencing took place on July 21, 1988, at which time Judge Politan rejected arguments of counsel relating to mitigating considerations and imposed the maximum sentence available under the Federal Sentencing Guidelines. The terms of the sentence were (i) fifty-seven months of incarceration on each of seven counts, to be served concurrently; (ii) a two year term of supervised release upon release from imprisonment, with stated conditions; and (iii) a special assessment of $50 on each count.

The facts underlying Mrs. Koven participation in the events which lead up to the contemplated crime may be summarized briefly. Mrs. Koven had no involvement with the criminal justice system prior to the offense which has led to this final appeal. There is no allegation that she or any other participant in the transaction (with the possible exception, based upon speculation alone, of the government informant Larry Nelson) was or has ever been in any way connected with organized crime. Rather, she was a housewife raising two teenage children and attending law school, embroiled in a particularly bitter and protracted divorce proceeding. The divorce proceeding was instituted in March, 1986 (at or about the time that a restraining order was issued removing her husband from the marital home). It is not disputed that during the twenty six year marriage, Mrs. Koven was subjected to a pattern of persistent, vicious, physical abuse and emotional cruelty at the hands of her husband, Irvin Koven, the purported victim. Considerable psychiatric and psychological expert testimony (together with that of family members witnessing the violence), supported a defense contention that Mrs. Koven's condition by

reason of this pattern of violence, reconciliation, further violence and harassment, was consistent with the profile of "battered woman's syndrome" with evidence of severe, stress-induced psychiatric disorder.

Testimony that the husband continued to harass Mrs. Koven and her children, through acts of emotional terrorism and vandalism after his removal from the marital home, was unrebutted at trial. In this context of fear and emotional turmoil, Mrs. Koven contacted Larry Nelson, ostensibly a "security system installer" to install a security system in her home for the protection of herself and her children and hopefully, to discourage further such acts by Mr. Koven. In a moment of desperation, Mrs. Koven communicated to Nelson that she wished to retaliate against her husband for a litany of malicious acts. She testified that Nelson initially suggested that she should have someone beat up Mr. Koven to stop the abuse. Nelson then suggested that he could assist her in finding a "hit-man" to end her problems by eliminating Mr. Koven. Mr. Nelson denies having suggested this final course.

Mr. Nelson contacted Agent Schenck of the FBI and advised him that he was in contact with a woman who was attempting to hire someone to murder her husband. Notwithstanding Nelson's denial under oath that he had had any previous relationship with the FBI as an informant, Agent Schenck testified that Nelson had supplied information on 10-12 occasions in the five year period prior to the Koven matter. Upon learning of the facts of this case, Schenck ordered Nelson not to inform any other law enforcement authorities about Mrs. Koven's desires. Schenck then directly or indirectly (using Nelson as his agent) took those steps which ultimately provided the basis of the Government's claim to jurisdiction over the proceeding. No contact or referral was made to local law enforcement authorities. He advised Nelson that the communication with the alleged "hit-man" was to be by an electronic paging device bearing an "800" area code. He engaged

in a number of recorded telephone conversations with Mrs. Koven wherein he proposed a variety of means of eliminating Mr. Koven, and eventually demanded a deposit for the "hit". The recordings contain highly incriminating statements by Mrs. Koven and were presented to the jury in both audio and transcription form. Next, he prompted Mrs. Koven to mail photographs of the supposed victim to a New York post office box. Finally, he arranged for her to obtain evidence of the completed act by directing her to pick up certain papers, which he videotaped.

Petitioner filed a timely notice of appeal on July 28, 1988. A post conviction motion for bail pending appeal, together with other requests, was filed with the District Court on September 14, 1988, heard on September 16, 1988 and denied on that date. A motion for bail pending appeal was renewed in the Court of Appeals for the Third Circuit on September 23, 1988 and denied on October 4, 1988. Petitioner's appeal of her conviction below was argued on January 10, 1989, and, by judgement entered on January 20, 1989 the judgment order of the District Court was affirmed.

An application for an extension of time within which to file a petition for writ of certiorari was presented to Associate Justice William J. Brennan, Jr. of the Supreme Court of the United States who, on March 20, 1989, signed an order extending the time to and including April 20, 1989.

Petitioner has been imprisoned since February 19, 1988, with a brief exception during March, 1988 at which time she was released by Judge Politan in order to facilitate her voluntary commitment to the Carrier Clinic for the psychiatric treatment and evaluation.

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW HAS CONDONED THE FEDERAL GOVERNMENT'S USURPATION OF STATE COURT SOVEREIGN JURISDICTION OVER A CRIMINAL CASE IN DIRECT CONTRAVENTION OF EXPRESS CONGRESSIONAL EXTENT.

The confines of the jurisdiction of the United States District Court are delineated in the United States Constitution, Article III, Sections I and II:

> "ARTICLE III, SECTION I. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
>
> SECTION II. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more States; — between citizens of different States; — between citizens of the same State claiming lands under

> grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."[1]

These two sections are illustrative of the limited nature of federal jurisdiction. If the controversy involved cannot be subsumed into one of these categories, there can be no jurisdiction. While no jurisdiction may be had outside of these areas, once jurisdiction is *properly* found, the court is not permitted to reject that controversy. *See Cohens v. Virginia,* 19 U.S. (6 Wheaton) 264, 404, 5 L. Ed. 257 (1821) "We [referring to the Supreme Court] have no more right to decline the exercise of jurisdiction which is given, *than to usurp that which is not given*" (emphasis added).

A review of the facts submitted herein reveals that there exists no question involving admiralty, diversity of citizenship, acts committed on federal lands or any other specific controversy enumerated in the Constitution. This being the case, should jurisdiction be at all present, it must be under the laws of the United States. Cognizance of any matter not specifically granted by such statute(s) would be violative of the Tenth Amendment as an unconstitutional encroachment upon the reserved powers of the several states (for the verbatim text of this and other amendments cited herein, refer to Appendix B, 10a).

The United States asserts jurisdiction in this matter based upon 18 U.S.C. § 1952A (hereinafter "§ 1952A"), commonly known as the "Murder-for-Hire" statute. For such jurisdiction to lie, two foundational elements must be established before recourse is available in a federal forum. There must be a "use of facilities of interstate commerce" with an "intent that a murder be committed . . ." Of immediate interest here is the former phrase, although the latter will also be discussed, *infra*, at Point II.

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1. United States Constitution, Article III, Sections I and II.

The reach of federal jurisdiction under § 1952A poses an important question of federalism: how far did Congress intend to intervene into the traditional state responsibilities of law enforcement? *United States v. Dickson,* 645 F. Supp. 727, 729 (D.D.C. 1986), *rev'd,* 816 F.2d 751 (D.C. Cir. 1987).

In determining the permissible boundaries of this expansion of federal power at the cost of the states' sovereignty, reference must be made to the revealed intent and stated policy goals of the legislators at the time of the discussion and passage of the Act (text of legislative history reproduced at Appendix B, 14a-16a).

Counsel for petitioner is cognizant of the ruling of the Court of Appeals for the District of Columbia rejecting the interpretation of the District Court limiting federal jurisdiction on the basis of legislative history. We nonetheless disagree, arguing instead that § 1952A is precisely such an instance when this Court has previously held that "clearly expressed legislative intent to the contrary" is present to the extent necessary to deviate from the plain meaning rule normally applied to unambiguous statutory language. *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). Congress was unambiguous in the Senate Report accompanying the proposed legislation that the presence of a federal nexus alone should not convert all contract murders into matters of federal responsibility. S. Rep. No. 225, *supra* at 305. The Committee Report for P.L. 98-473 states in pertinent part:

> "Federal jurisdiction should be asserted selectively based on such factors as the type of defendants reasonably believed to be involved and the relative ability of the Federal and State authorities to investigate and prosecute. For example, the apparent involvement of organized crime figures or the lack of effective local investigation because

> of the interstate features of the crime could indicate that federal action was appropriate. On the other hand, the Committee fully appreciates that many State and local police forces and prosecutors offices are quite capable of handling a murder-for-hire case notwithstanding the presence of some interstate aspects and regardless of the criminal backgrounds of the defendants. Cooperation and coordination between Federal and State officials should be utilized to ensure that the new murder-for-hire statute is used in appropriate cases to assist the States, rather than to allow the usurpation of significant cases by federal authorities that could be handled as well or better at the local level." Legislative History of P.L. 98-473.

Additional assistance in determining the intended scope of federal jurisdiction under the Murder-For-Hire statute can be found in judicial interpretations of the legislative history of both its progenitor act, 18 U.S.C. § 1952, as well as interpretations of § 1952A itself.

In *Rewis v. United States*, 801 U.S. 809, 811 (1970) this Court discussed the legislative background of the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act:

> "Legislative history of the Act is limited, but does reveal that Section 1952 was aimed primarily at *organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another.*" (emphasis added).

Discussing the Committee Report on 18 U.S.C. § 1952A, the District Court highlighted one of the major concerns of

legislators in adopting the Act:

> "One of the first issues mentioned in the report's discussion of Section 1952A is its encroachment on what has traditionally been regarded as a crime of state concern, murder. The committee more or less apologizes for involving the federal government in murder prosecution, justifying the intrusion by noting the gravity of the crime and its intention that only the most serious examples will be federally prosecuted. In other words, even in enacting Section 1952A, Congress sought to upset the traditional distribution of federal and state power as little as necessary to accomplish its aims." *United States v. Varbaro,* 597 F. Supp. 1173, 1179 (S.D.N.Y. 1984).

Both the authors and interpreters of § 1952A clearly state that the primary objective of § 1952A was to selectively assist local authorities in combating criminal syndicates responsible for interstate crime where those local officials were unable to effectively deal with such combinations. Two caveats were placed upon the exercise of this "hybrid" jurisdiction; only the most serious examples of criminal wrongdoing would be federally prosecuted and those cases which were within the capabilities of state prosecution were to be undisturbed.

The underlying criminal activity which gave rise to the federal prosecution of petitioner involves none of these legitimate, jurisdiction-creating elements. Here, the case essentially involved a conspiracy by a distraught, misguided New Jersey housewife to commit a single criminal act rather than any organized plan to control criminal activity on an interstate basis. Absent the deliberate infusion of interstate elements into the contrived scenario

by federal investigators and/or informants, the case would have presented no interstate characteristics whatsoever. Further, the resources of the local authorities were far from overwhelmed or unfamiliar with a case such as this.[2] Rather than refer the investigation to local authorities (as envisioned by the drafters of the legislation), the government agents involved unilaterally improperly determined to retain control over the investigation.

Should the above stated statutory interpretation arguments only partially persuade this Court, the injection of deliberate acts of prosecutorial misconduct demands that this Court act where the courts below have failed to act to denounce the concerted efforts to convert a local matter into a federal one. A review of the facts of this case demonstrates multiple instances of deceit and artifice in a concerted effort to acquire jurisdiction over this matter through their own conduct, rather than that of petitioner.

The leading case enunciating this concept is *United States v. Archer,* 486 F.2d 670 (2nd Cir. 1973) wherein the Court stated:

> "Our holding is rather that when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an

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2. Within the past six months, at least two cases concerning intra-spousal murder-for-hire have been uncovered and are presently being prosecuted by *local* law enforcement and prosecutorial offices in the State of New Jersey. *See The Newark Star Ledger,* September 29, 1988 at 33, col. 1 ("Husband arrested on charges of hiring a 'hitman' to murder his wife"); *The Newark Star Ledger,* March 16, 1989 at 43, col. 3 ("Freehold woman seized in plot to kill husband").

> interstate element would be present. *Manufactured federal jurisdiction* is even more offensive in criminal than in civil proceedings, cf. 28 U.S.C. Section 1359." *Archer, id.* at 682 (emphasis added).

Of particular relevance here is the fact that the federal officers themselves acted to "ensure that an interstate element would be present." *Archer, supra.* In the matter at bar, while the FBI did not physically act to effect the necessary jurisdiction-creating elements, their manipulation of petitioner created an environment which would all but ensure that those same jurisdiction-creating interstate elements would be present.

The FBI never informed *any* state or local authorities of their operation, let alone discussing transferring the investigation to them. This, it should be noted, occurred when there was absolutely no real chance that such a report would jeopardize either the handling of this matter or the working relationship between federal, state and local law enforcement officials. An informant which had full knowledge of the diminished capacity of petitioner and her susceptibility to his influence, served as the link between petitioner and the choice between the use of federal jurisdiction-granting acts and purely local activities which would have denied such federal jurisdiction. This should be compared with *United States v. Smith*, 749 F.2d 1568 (11th Cir. 1985), wherein manufactured jurisdiction was found *not* to exist when the defendant created the environment which resulted in federal jurisdiction, not, as here, where the federal agents created the environment. Mrs. Koven was completely and totally subservient to the will and direction of an FBI agent and informant orchestrating the sham "hit-man" scenario.

Each mechanism utilized in the investigation of this matter was consciously selected to ensure the use of an interstate facility

of commerce. An "800" area code beeper was chosen as the means to establish communication between petitioner and her presumed co-conspirator, the FBI agent. Beeper and/or telephone calls were continually used to obtain evidence during the investigation. Additional information to be used at trial was requested by mail. All of these activities were performed at the direction of the government agents, rather than as a conscious commandmant by petitioner. In fact, the principal investigating agent has admitted that he ordered the informant not to involve any other law enforcement bodies so that he would be able to personally administer this field assignment.

Considering that the criminal act which is the subject of this case was completely local in nature, that no activities necessarily had to occur outside the borders of New Jersey, and that the only interstate elements involved were those actively instigated by the government, the use of jurisdiction under § 1952A is an unconstitutional usurpation of state sovereignty as well as a violation of petitioner's due process rights under the Fifth Amendment. The Government has displayed a disturbingly cavalier attitude toward the fundamental issues of federalism confronted herein. Perhaps more importantly, its actions (and subsequent defenses thereof) belie a gross misunderstanding of the appropriate degree of coordination and cooperation between local and federal authorities envisioned by Congress in prescribing acceptable standards for federal intervention to avoid usurpation throughout this proceeding. The comments of Assistant United States Attorney Victor Ashrafi in his summation at trial are representative of this misguided, "ends-justify-the-means" philosophy:

> ". . . Mr. Gallucio . . . is apparently trying to say that Geraldine Koven is not guilty of the crimes because the FBI did not have jurisdiction to investigate it. Well, there are a couple of responses to that. Very common sense responses. If it's true

> — and I would submit it is not for you to decide. Judge Politan is totally capable of making legal rulings like that. *But if that's true, so what?* Isn't it kind of like a bank robber robbing a bank, getting away in his car, getting across the county line, and then being arrested by the Essex County Sheriff and coming to court and saying 'I was arrested in Morris County. That's no good. You can't convict me. The Essex County Sheriff's officers had no right to arrest me in Morris County. Forget that the bank robbery happened. Forget I did it. They didn't have jurisdiction, so you got to find me not guilty.' "[3]

In addition to the foregoing constitutional arguments, the following prudential considerations dictate that such an expansion of federal jurisdiction, as is found here, should be prohibited on broader policy grounds. The practical effect of such "permissive" extension of federal jurisdiction is especially problematic from the governmental resource and burden-sharing perspective.

Federal intervention into areas where adequate state resources exist to address the crimes in question would serve no real purpose. Same is especially true in this case, as not only are there sophisticated resources available in New Jersey to prosecute this claim, but also an evolved, sophisticated body of case law in this particular area (concerning battered women) to more fully effectuate the "justice" portion of criminal justice in the context of an indictment predicated upon intra-spousal murder or murder-for-hire.[4]

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3. Trial Transcript at 10:27-2-13 (emphasis ours).

4. *See, e.g., State v. Kelly*, 97 N.J. 178 (1984) for a discussion of battered woman's syndrome and its efficacy as a mitigating circumstance, thereby reducing a charge of murder to manslaughter.

Such an expansion of essentially duplicative state and federal jurisdiction can only serve to further encumber an overburdened federal court system in its attempts to cope with an ever-increasing civil and criminal caseload.

Finally, the end result of such additional jurisdictionally contrived federal cases would transfer the financial burdens related to prosecution and incarceration from the states to the federal government at a time in which any unnecessary federal expenditures are being severely limited, if not eliminated.

In a period of ever-decreasing judicial resources and the ever-rising number of clear, constitutional and statutorily-arising cases and controversies, acknowledgment of additional "contrived" jurisdiction, as is found here, should be denied.

II.

THE COURT OF APPEALS ERRED, AFTER REVIEWING PETITIONER'S CONTENTIONS OF INADEQUACIES, OMISSIONS AND/OR MISLEADING STATEMENTS IN THE DISTRICT COURT CHARGE TO THE JURY, IN NOT FINDING SAME TO BE PLAIN ERROR HAVING A PREJUDICIAL IMPACT ON THE JURY'S DELIBERATIONS.

Two substantial instances evidencing the facial deficiency of the jury charge below are (i) the obvious confusion in the record relating to the misquotation of 18 U.S.C. § 1952 and § 1952A and (ii) the fact that the trial court failed to explain to the jury *any aspects* of the state law serving as the substantive and jurisdictional foundation to the federal charges. These deficiencies constitute plain error and, as such, warrant reversal of the judgment of conviction.

This confusion of the Murder-for-Hire and Travel Act demonstrates that the jury was at least uninformed, if not completely unaware, of the deliberative duty it was to perform. It should have been the judge who was to properly prepare a charge which eliminated, rather than exaggerated, the confusion in this matter.

The fact that the jury was confused by the lack of clarity in the charge as presented is evidenced by the six questions posed by the jury.[5] The Government has taken the position that since the specific questions returned focused on issues of entrapment and/or manufactured jurisdiction, there was no confusion in any individual juror's mind respecting any issues other than those to which the questions are literally directed. Conversely, it is petitioner's contention that the absence of questions specifically addressing interpretive requirements of the New Jersey murder statute is instead attributable to the jurors, erroneous belief that they had no duty to deliberate on the issue of whether Mrs. Koven *intended to commit murder*, as such terms are defined in applicable New Jersey statutes. Absent any instruction from the trial court, they may well have believed that they were simply to accept such position (*i.e.*, intent to commit murder) as true. The statement of Judge Politan in rejecting petitioner's challenge to the jury

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5. 1) We would like the legal definition of entrapment.

2) Agent Schenck's testimony on the very first phone call February 2 or 3.

3) We would like to hear Larry Nelson's testimony.

4) Would it be possible to obtain a copy of the instructions on entrapment (12 copies)?

5) What constitutes the difference between an agent and an informant?

6) When did Larry Nelson become an agent of the FBI?

charge (belatedly raised at her motion for bail pending appeal) that "I think the jury clearly, unequivocally knew it was a murder situation" is, with all due respect, unpersuasive. Absent any instruction on the requirements of N.J.S.A. 2C:11-3, how can one reasonably assume that a lay juror might adequately comprehend its meaning and the appropriate standard for determining *the intent* of the petitioner to violate same?

The basic requirement of a jury charge is that the jurors must be instructed on "all essential questions of law, whether requested or not". *See Screws v. United States,* 325 U.S. 91 (1945). Further, "[a] jury may not justifiably find a verdict until they are instructed on the law, sufficiently to show them what is necessary for proof". *Morris v. United States,* 156 F.2d 525 (9th Cir. 1946). This obligation to fully charge arises whether or not such charge is requested by either counsel. *See Kreiner v. United States,* 11 F.2d 722 (2nd Cir. 1926), cert. denied, 271 U.S. 688.

The Court of Appeals for the Ninth Circuit in *Morris v. United States, supra* at 532, has warned judges as to the proper scope of their criminal charge:

> "Where the instruction or charge of the court is based upon a statute which is sufficiently clear, the judge may set forth the statute in the instruction, otherwise he should explain it in other language in order that the jury may have a clear understanding of the law before applying it to the facts."

It is a well established principle that the mere allusion to a term of art in a jury instruction is insufficient, as without definition, juries could easily place the wrong connotations upon terms unfamiliar to them. A footnote contained in *United States v. Combs*, 762 F.2d 343 (9th Cir. 1985) at 1347 fn. 1 succinctly

brings out this realization regarding inadequate instructions: "While it is true that the court also read Count One of the indictment to the jury, this did not cure the defective instruction. The indictment did not define Section 5821 or Section 5822 but merely stated that Combs had allegedly violated them (*i.e.* it only mentioned them by number and gave no description of their requirements or set forth any of their language)."

A review of the charge delivered by Judge Politan reveals a nearly identical situation, wherein he defined the essential elements of proof necessary to find petitioner guilty of violating 18 U.S.C. § 1952A as being:

> "[F]irst, the defendant used or caused another to use an interstate means of communication [or the mail]; second, that the use of the interstate means of communication was with the intent that a murder be committed in violation of a state or federal law; third, that a murder would be committed as consideration for the receipt of money or promise or agreement to pay money; and fourth, that the defendant acted knowingly and willfully." (Appendix C, p. 26a).

In the instant matter, the crucial facts do not involve § 5820 or § 5821; rather, they involve the definition of "intent to commit murder in violation of state or federal law". Yet no legal definition or explanation is offered to assist the jury in discerning the precise legal meaning of this absolutely necessary predicate act. Interestingly, this fatal omission occurred in the context where the court did define two of the other "terms of art" in the charges: "pecuniary value" and "facility in interstate commerce".

Without this information, the jury was deprived of the very information that was crucial to their essential function of

determining whether the actions of the petitioner properly comported with the explicit requirements of the relevant statute, N.J.S.A. 2C:11-3.

New Jersey has abolished the common law crimes; only statutorily defined crimes continue to have existence in the law. The predicate crime with which petitioner is charged consists of three pages of tightly spaced text in the New Jersey Criminal Code. The exact meaning and confines of this statute is still subject to considerable debate in this state; its interpretation has consumed and will continue to consume thousands of hours of attorney and judicial review and scrutiny. Yet the very terms most basic to the accusation and conviction of petitioner were never presented to the jury.

By failing to provide the legal definition of murder, the jury was left to their own lay definition. Determining exactly what the jury generally understood the definition to be is entirely left to speculation.

If it was accepted by the jury that petitioner was guilty of such an intent to commit murder as the Government contends, it only follows that she could be found guilty of "murder-for-hire". But should the relevant New Jersey law have been presented to the jury with full explications, the jury could have found a mitigating factor in the petitioner's complete and/or partial defense of "battered woman's syndrome". As such, the intent "presumed" by a possible lay definition might either have been found lacking and/or mitigated as respects the charge from "murder-for-hire" to "manslaughter-for-hire". In such an instance, the jury would be compelled to return a verdict of not guilty on 18 U.S.C. § 1952A as the facts would not fit the asserted statutory definition.

The chief error here though is that by failing to charge the jury with a clear, understandable set of instructions, the fact-

finding function of the jury was fatally flawed. There is no certainty in knowing which level of culpability, if any, petitioner was found by the jury to have possessed during the entire criminal episode. The jury, not being informed as to the exact nature of proof necessary for conviction, upon finding any degree of culpability, might have felt obligated to agree with the contentions of the prosecution.

Given the extent and severity of the foregoing errors and omissions in the trial court's charge to the jury, this Court cannot but agree that the failure to charge each element of the offense should be reversible error, even where the elements not charged are wholly uncontested *See United States v. Natale*, 526 F.2d 1160, *cert. denied*, 96 Sup. Ct. 1724, 425 U.S. 950, 48 L. Ed. 2d 193 (1975); *Russo v. New York*, 96 Sup. Ct. 1724, 425 U.S. 950, 48 L. Ed. 2d 193 (1975).

III.

THE DECISIONS OF THE LOWER COURTS IMPOSING AND/OR AFFIRMING SENTENCE HEREIN VIOLATE THE CONSTITUTIONAL RIGHTS OF THE PETITIONER UNDER THE FIFTH AND EIGHTH AMENDMENTS BY REASON OF THEIR MISAPPLICATION OF RELEVANT PROVISIONS OF THE FEDERAL SENTENCING GUIDELINES AND/OR THE FEDERAL RULES OF CRIMINAL PROCEDURE WHICH VIOLATIONS MUST BE REDRESSED BY THIS COURT.

A. The courts below misapplied the Federal Sentencing Guidelines in refusing to acknowledge a number of significant, mitigating factors presented on behalf of petitioner, which factors justified a downward departure from the range, as provided in 18 U.S.C. § 3553(b).

The Federal Sentencing Guidelines provides a mandatory mechanism to assist judges in assessing the penalty for an unlawful act within an effective, fair sentencing system. The foundation of this system rests upon applying principles of honesty, uniformity and proportionality on an individual basis throughout the federal judicial system. Federal Sentencing Guidelines, *supra* at p. 2.

The long term objective is to create an almost mechanistic rigid system of justice, uniform in broad areas. Courts are to depart from these standards only when they find "an aggravating or mitigating circumstance . . . that was not taken into consideration by the Sentencing Commission . . . " 18 U.S.C. § 3553(b). However, at this initial stage the Commission instead is encouraging meritorious departure from the rules as part of an evolutionary process to assist in the identification of additional mitigating and/or aggravating sentences. Federal Sentencing Guidelines, *supra,* at p. 8.

The latitude granted in an "atypical" case is not so limited as might be thought at first reading of the Commission's policy statement. Only three broad restrictions, not relevant here, are placed upon downward discretion.[6] The Commission expressly recognizes that there may be grounds for departure not mentioned.[7] The present case is *precisely* the type of "atypical" case contemplated by the Commission as it presents several, substantial mitigating considerations meriting downward departure, which are not effectively addressed in the Guidelines.

Critical reaction to the new Guidelines has pointed up the broad deficiencies in the limited criteria available in considering downward departures. At a symposium on the Federal Sentencing Guidelines, the Hon. Jack Weinstein, J.U.S.D.C.-E.D.N.Y., concluded was that the Guidelines sorely failed to take into consideration a variety of exceedingly probative factors.[8]

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6. Federal Sentencing Guidelines, *supra,* Section 5h1.10, at p. 242, Section 5h1.4, at p. 240, Section 5k2.12, at p. 251.

7. Federal Sentencing Guidelines, *supra*, Section 5k2. 12 at p. 251.

8. Judge Weinstein noted that the Guidelines specifically have not taken into account some of the following issues:

1. The good that the defendant has done in his lifetime.

2. The fact that a defendant's job will be lost and he is unlikely to obtain another, making rehabilitation after release exceptionally difficult.

3. Extreme illness at home requiring the presence of the defendant.

4. The illness of the defendant, or increasing defendant's health problems while incarcerated need to be considered.

5. The fact that the defendant is elderly.

(Cont'd)

The rights of the petitioner under the Fifth and Eighth Amendments under the Constitution were violated by the trial court's misapplication of the Guidelines in failing to recognize the following unique and probative mitigating factors should have resulted in a downward departure from the mechanistically prescribed sentencing range:

• The overwhelming, uncontradicted medical evidence of petitioner' s suffering from "battered woman's syndrome" and the extent to which same contributed to her involvement in the crime; the extent of psychiatric impairment that petitioner suffered from prior to, during and after the subject offense (and, perhaps, most importantly, the extent to which (i) her involvement in the offense and these proceedings has served to exacerbate her condition, and (ii) incarceration threatens to make the affects and residue of this psychiatric infirmity irreversible);

(Cont'd)

6. Young children at home requiring supervision (*i.e.*, single parent family).

7. The defendant's leadership roll in the community, where leaders are badly needed.

8. The defendant's business may provide a livelihood for others and may be important to the community and his presence may therefore be vital.

9. In a drug case, the low purity of the narcotics found in the defendant's possession may indicate that he is so far removed from the high levels of distribution hierarchy as to warrant a downward departure.

10. The immaturity of the defendant may make prison exceptionally dangerous for him or her.

11. There is substantial post crime rehabilitation which would be jeopardized by imprisonment. Federal Sentencing Reporter, Vol. 1, No. 2, July and August 1988, p. 96, *Alternative Punishments Under the New Federal Sentencing Guidelines Symposium Discussion by Judge Jack B. Weinstein, Eastern District New York.*

- The extent to which the petitioner played a valuable, contributing role in her community, her synagogue, and as the sole reservoir of guidance and continuity for her family, a fact that is particularly relevant given the extent of abuse, violence, and destabilizing neglect that her children have been subjected to by reason of the violence of the purported victim towards petitioner and her children;

- The fact that the petitioner's conviction and incarceration would (and has) result in the loss of her nursing license, and, with strong likelihood, act to preclude her from ever obtaining a license to practice law; a substantial period of incarceration may well serve to permanently render her unable to work at either of the professions that she is mostly adequately trained, thereby undermining the possibility of her truly rehabilitating herself.

Each of these mitigating considerations was amply and credibly presented in either testimony at trial, or at sentencing in materials provided to the trial court by professionals who had known Mrs. Koven for a number of years. The trial judge, nonetheless, chose to singlemindedly ignore all of these factors. Instead, he persisted in characterizing both the case and the underlying marital turmoil of Mrs. Koven and her husband as motivated "simply by greed" (Appendix C, 37a).

This erroneous interpretation effectively blinded the trial judge to the other aspects of the case and contributed to his failure to apply the guidelines in accordance with the instructions provided by the Commission. As will be discussed further at Point III-B, *infra,* this critical misinterpretation from the bench, is even more disturbing and damaging by reason of its being based on unsupported and, as repeatedly noted by defense counsel at trial, erroneous information and unsubstantiated testimony presented at trial, yet included in the presentence report (Appendix C, 37a, 52a).

The extent to which this impression of petitioner and the case jaded the trial court's perception of Mrs. Koven and contributed to his failure to fairly consider the individual factors presented in this case, thereby violating the essential principles of proportionality and fundamental fairness in the Guidelines, cannot be tolerated. It is imperative that this Court address this constitutionally impermissible inequity and transmit a clear message to the trial court(s) regarding the necessity that all factors must be carefully considered in determining a fair and correct sentence. The individualization of the sentencing process should not be eliminated in order to conform to rigid numerical values stamped on the foreheads of defendants. All legal options must be examined to eliminate disparity, but not, in the process of promoting honesty and uniformity, take away balance and equitable decision-making that is tempered with humanitarian considerations which is required of proportionality.

B. The courts below have clearly and inexcusably misapplied Section 3E1.1 of the Federal Sentencing Guidelines in refusing to allow Mrs. Koven the two point reduction due by reason of her unequivocable acceptance of her own responsibility for her involvement in the crime and the failure to do so is an intolerable abuse of discretion, resulting in the violation of the Fifth and Eighth Amendment rights of the petitioner.

In the course of the sentencing hearing, Mrs. Koven was asked directly by the court whether she accepted responsibility for the crime. Her response is unequivocal:

> "MRS. KOVEN: I certainly do, Your Honor. It was my voice on those tapes. It was my participation in this fantasy that was created . . . I can tell you that if I could have done anything now or in the past twelve months to have eliminated the agony that my children were forced

> to endure, the arrest, the trial, the horror of it all, to think that their mother could have perpetrated such a thing, I'd give it all . . . and I have no explanation of why I fell into this. It is inexcusable, but I was described as a pillar of strength . . ., but I, too, as pillars of strength do, deteriorated. I compromised, myself into an illogical, inexcupable act . . . I'm lucky because I've been brought out of it with only my own destruction. None of it made any sense. Because I know I could have never had any peace if it [referring to the murder] had happened and, too, would have been my own undoing." (Appendix C, 41a-43a).

Both the trial court and the probation officer who prepared the presentence investigation report have committed the fatal, inexcusable error of allowing their judgment to be tainted by the position taken by petitioner and her counsel in the course of an adversarial trial proceeding. The zealousness of defense counsel and petitioner in expressing her innocence or justification for involvement in the offense, has blinded them from objectively performing their duties under relevant rules of court and guidelines promulgated by the Commission. For this Court to sanction such an impermissible affront to the adversarial system, and the chilling effect that same will have on the unquestioned right of an accused to steadfastly argue their innocence, cannot conceivably be allowed to occur. It is impossible to conceive of how a defendant could more clearly and adequately relate her remorse and acceptance of responsibility than in the present case (Appendix C, 41-43a). If this ruling is allowed to remain undisturbed, the practical effect is that no defendant, other than one who steps through the door of the courtroom and enters a guilty plea without qualification, will ever be allowed to avail themselves of the express provision affording mitigation under the Guidelines.

C. Petitioner's due process rights under the Fifth Amendment and her protection from cruel and unusual punishment afforded by the Eighth Amendment have been violated by the trial court's failure to comport with the mandate of Federal Rules of Criminal Procedure, 32(c)(3)(A) and 32(c)(3)(D).[9]

The trial court failed to assure petitioner access to her presentence investigation report at a reasonable time before the

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9. The full text of Federal Rules of Criminal Procedure, 32(c)(3)(A) and 32(c)(3)(D) are as follows:

> (A) At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation[,], including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.
>
> (D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons."

sentencing hearings. Said court then alleged false information to remain a part of said presentence investigation report and clearly relied on such false information as a basis for the sentence imposed. As such, the sentence must be vacated and the matter remanded for sentencing. *United States v. Rone,* 743 F.2d 1169 (7th Cir. 1984). Convicted defendants have a due process right to a fair sentencing procedure which includes the right to be sentenced on the basis of accurate information. This premise is beyond reasonable contest. *United States v. Rone, supra; Blake v. United States,* 841 F. 2d 203 (7th Cir. 1988); *Andrews v. United States,* 817 F.2d 1277 (7th Cir. 1987); *United States v. Ursillo,* 786 F. 2d 66 (2nd Cir. 1986). The petitioner was denied such a fair sentencing procedure by the trial court's failure to assure her access to her presentence investigation report at a reasonable time prior to trial, by the manifest confusion regarding her understanding of the objections to said report which were entered off record and never resolved by the court, and most inexcusably, by the trial court's clear reliance on certain of this misinformation and/or direct falsities in assessing sentence herein.

Mrs. Koven's first opportunity to review and discuss the report with her counsel prior to sentencing occurred approximately 15 minutes before the sentencing hearing commenced. The practical effect of this failure to abide by the mandate of Federal Rules of Criminal Procedure, 32(c)(3)(A) relating to disclosure, was an unacceptable amount of confusion, evidenced throughout the record at the hearing, regarding her objections to said report, and the trial court's manifest error in failing to resolve and/or correct same.

Both Mrs. Koven and her counsel at trial clearly advised the court that she disputed certain information included in the presentence investigation report and claimed that such information was false. A muddled colloquy between the court and defense

counsel reflects the court's ineffective attempt to allow Mrs. Koven an attempt to comment on the content of the presentence investigation report. In response to the court's question as to whether there are any objections to the factual statements contained in the presentence investigation report. Petitioner's counsel clearly states that " . . . There is a disagreement as to certain factual assertions." (Appendix C, 30a). The court then inexcusably fails to address these disagreements individually to rectify same or place on the record its assurance that such alleged misstatements and/or falsifies will not be relied upon in determining sentence. Instead, the court erroneously attempts to bifurcate those factual assertions contained in the presentence investigation report made by Mrs. Koven, juxtaposed against those factual assertions contained in the presentence report made by either the government and/or her husband. From this point forward, confusion is rampant, to the clear and obvious detriment of the petitioner.

> "THE COURT: . . . Are all of Mrs. Koven's factual assertions contained in the presentence report to her satisfaction?
>
> MR. A. GALLUCCIO: Yes.
>
> THE COURT: Are all her responses to what she perceived to be misstatements by her husband and the government in the presentence report?
>
> MR. A. GALLUCCIO: Yes. Those are in the presentence report. She doesn't agree with them, but they're there." (Appendix, 30a-31a).

The court then proceeds to adopt the factual statements contained in the presentence investigation report as its findings of facts in the sentencing procedure. There are no further inquiries

by the court as to the particular areas that Mrs. Koven disagrees with. There is no statement by the court that these areas will not be relied upon or considered in sentencing. To the contrary, the court has expressly stated that it is going to rely on *all* statements contained in the presentence investigation report to determine sentence herein.

This patent failure to comply with the mandate of the applicable Federal Rules of Criminal Procedure cannot be sanctioned. Further, the trial court's failure to clarify these points in accordance with its duties in the sentencing process cannot be defended and/or excused as a result of some confusion inadvertently occasioned by both the court and/or defense counsel as a possible oversight or momentary forgetfulness by the trial court in their attempt to comply with the mechanistic requirements of the Guideline's sentencing procedure. Mrs. Koven herself reminds the court that she considers certain information in the aforesaid presentence investigation report to be false in the closing moments of the sentencing hearing when she is allowed to testify on her own behalf. Again, the trial court fails to pursue and/or rectify any of the individual points disagreed with.

It must be noted that the individual points of error, misstatement, and/or direct falsity that petitioner alleges exist in the presentence investigation report are not trivial matters. Specifically, she claims that an allegation of a prior act of violence against her husband (stabbing with a knitting needle) is false. No evidence of this allegation is ever presented or considered in the course of the sentencing hearing. Additionally, Mrs. Koven and/or defense counsel contended throughout trial, at the sentencing hearing, and in their comments to the probation officer preparing the presentence investigation report that the vast sums of money which Mrs. Koven is accused of having spirited away from the marital coffers is a blatantly false and unsubstantiated accusation

The failure of the trial court to address this final issue is the most disturbing factor of all. The trial court not only fails to resolve this issue, but instead allows it to underly and motivate all determinations made in the course of the sentencing hearing. The trial court repeatedly refers acceptingly to the allegation that Mrs. Koven took over $200,000 to $300,000 from the marital funds. The acceptance of this position by the trial judge clearly underlies its jaundiced opinion that greed is the only motivating factor leading Mrs. Koven to her involvement in the offense (Appendix C, 37a). Defense counsel and/or Mrs. Koven repeatedly denied the validity of this allegation and pointed out that they are both wrong and not established by the facts (Appendix C, 37a). Notwithstanding these objections, the trial proceeds to rely on this false information, and to reject any mitigating considerations presented by or on behalf of the petitioner.

The trial court apparently seems to rely on the bench's experience in having done a "fair amount of matrimonial work . . ." (Appendix C, 39a) and the fact that both the false accusation and a rejection thereof by Mrs. Koven, are contained in the presentence investigation report, as an adequate resolution of this issue and an assurance that same will not have a determining role in the sentencing process. Such a procedure is inadequate, unconstitutional and intolerable. The mandate of Federal Rules of Criminal Procedure, 32(c)(3)(D), and the body of caselaw clearly supporting it, militates for this Court acting to redress this failure.

It must also be noted that the prejudicial and injurious effects of the false statements contained in the presentence investigation report continue to live with and harm the petitioner to this date by reason of their inclusion in the materials forwarded from the District Court to the Bureau of Prisons in the course of her present incarceration. The same falsities continue to re-arise in the context of security designation hearings and/or custody status determinations conducted by the Bureau of Prisons to determine

the location, manner and nature of facilities Mrs. Koven may utilize while incarcerated. It is not acceptable and/or sufficient to presume that the quantum of falsity, or extant reliance thereon by the trial court, may not be sufficient to result in a different sentence being assessed upon remand to the trial court. Mrs. Koven continues to be prejudiced by the very inclusion of these misstatements in the materials that are relied upon by the Bureau of Prisons.

Further, absent instructions from this Court to the Circuit and District Courts below regarding the necessity of full and complete compliance with these aspects of the sentencing proceeding, the number of future defendants whose constitutional rights will be compromised by failure such as those presented herein is formidable and disturbing.

CONCLUSION

The present case is illustrative of persistent and serious misapplication of the law by the Court of Appeals for the Third Circuit in its affirmation of proceedings below in the District of New Jersey. Singly or in combination, the serious and disturbing problems in the instigation of this action, in the clearly erroneous charge to the jury and in the blatant misapplication of applicable sentencing procedures demand this Court's attention. Clear instructions as to proper conduct must be provided to both the bench and the prosecution to rectify the constitutional violations inflicted upon the petitioner, and to insure that such misconduct and/or error does not continue in the future. This Court alone can correct the situation, and correction is urgently needed.

For the reasons which have been set forth, certiorari should be granted.

Respectfully submitted,

GLENN E. GROMANN
Counsel of Record
ACHESON, PELIO & SCARINCI
Attorneys for Petitioner

KENNETH J. HOLLENBECK
PETER S. MONE
On the Petition

APPENDIX A — THE DECISIONS BELOW

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5605

UNITED STATES OF AMERICA,

v.

KOVEN, GERALDINE S.

GERALDINE KOVEN,

Appellant

Appeal from the United States District Court
for the District of New Jersey (Newark)
(D.C. Criminal No. 88-00049-01)
District Judge: Hon. Nicholas H. Politan

Argued January 10, 1989

Before: HIGGINBOTHAM, COWEN and ALDISERT,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

that the Government improperly manufactured federal jurisdiction in order to obtain a federal

criminal indictment; that the district court erred by failing properly to charge the jury and that the sentence imposed by the district court was violative of the eighth amendment,

it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

s/ A. Leon Higginbotham
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk

Jan 20 1989

Appendix A

ORDER DENYING MOTION FOR BAIL PENDING APPEAL BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CRIMINAL NO. 88-49(1) NHP

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALDINE KOVEN,

Defendant.

ORDER

This matter having been opened to the Court by Carluccio & Carluccio, Esqs., by Robert J. Carluccio, Esq., Attorney for Defendant, Geraldine Koven, and Victor Ashrafi, Esq., Assistant U.S. Attorney appearing for the U.S., and after having examined the Affidavits and any Exhibits filed herein, and after having heard oral arguments and having rendered its opinion and reasons for this ruling as appeared in the transcript of proceedings attached hereto, and for good cause shown,

IT IS on this 16th day of September, 1988

Appendix A

ORDERED that Motion for Bail Pending Appeal is hereby denied for the following:

1. The Burden was not met by Defendant by clear and convincing evidence that Defendant will not flee the jurisdiction and,

2. Defendant does pose a danger to the community.

3. None of the issues raised by Defendant on the law were substantial issues, to wit manufactured jurisdiction and improper charge to the jury.

It is further ORDERED that the request for copies of the character reference letters is denied based upon the principle of confidentiality.

It is further ORDERED that the present defense counsel have the opportunity to review the Pre Sentence Investigation Report presently on file with the U.S. Probation office and after Defense counsel examines same together with the trial transcript, he may show a substantial reason why he needs the probation report for appeal and will be considered thereafter.

It is further ORDERED that the Defense motion for permission to obtain copies of Defendant medical records while incarcerated is granted and the Bureau of Prisions shall release said records to Robert J. Carluccio, Esq. attorney for defendant.

s/ Nicholas H. Politan
HON. NICHOLAS H. POLITAN
J.U.S.D.C.

Appendix A

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(Original Filed July 27, 1988)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Case Number 88-49(1) (NHP)

UNITED STATES OF AMERICA

V.

GERALDINE S. KOVEN

Adolph Galluccio, Esq.
Defendant's Attorney

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

THE DEFENDANT:

* * *

was found guilty on count(s) 2, 3, 4, 5, 7, 8, & 9 (redacted cts. 1, 2, 3, 4, 5, 6, & 7) after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Nos.
18:1952 A	Murder for Hire	1-9
Date of Offense 2-19-88		(redacted to read counts 1-7)

Appendix A

The defendant is sentenced as provided in pages 2 through 4, imposed pursuant to the Sentencing Reform Act of 1984.

* * *

Count(s) 1 & 6 (of original indictment) are dismissed on the motion of the United States.

* * *

It is ordered that the defendant shall pay to the United States a special assessment of $350.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 099-34-1671
Date of Imposition of Sentences: 7-21-88
Defendant's residence address: 9 Clifford Drive,
Wayne, New Jersey
Name & Title of Judicial Officer: Hon. Nicholas H. Politan

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be Imprisoned for a term of 57 months-count 2 (redacted count 1); 57 months on each of counts 3, 4, 5, 6, 8 & 9 (redacted counts 2, 3, 4, 5, 6, & 7) to run concurrently with each other and concurrently with sentence imposed on count 2. (redacted count 1)

* * *

Appendix A

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years. This term consists of terms of two (2) years on each of counts 2, 3, 4, 5, 7, 8, & 9 (redacted counts 1, 2, 3, 4, 5, 6, & 7) all such terms to run concurrently and that the defendant shall not commit another crime.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. that defendant shall participate in a mental health program approved by the United States Probation Office;

2. that defendant shall have no contact with her husband, Irven Koven, without prior notification to the Probation Office.

Appendix A

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

Appendix A

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

APPENDIX B — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. Section 1254(1). Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

Appendix B

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

18 U.S.C. Section 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section, "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

(Added Pub. L. 87-228, section 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212; Pub. L. 91-513, Title II, section 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.)

18 U.S.C. Section 1952A. Use of interstate commerce facilities in the commission of murder-for-hire

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than five years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.

(b) As used in this section and section 1952B —

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; and

(2) "facility of interstate commerce" includes means of transportation and communication.

(Added Pub. L. 98-473, Title II Section 1002(a), October 12, 1984 98 Stat. 2136.)

18 U.S.C. Section 3553(b)

(b) Application of guidelines in imposing a sentence. — The Court shall impose a sentence of the kind and within the range, referred to in subsection(a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an application sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

Appendix B

Committee Report on 18 U.S.C. Section 1952A. Legislative Intent.

Part A — Murder for Hire and Violent Crime in Aid of Racketeering Activity

1. In general

This Part of title X proscribes murder and other violent crimes committed for money or other valuable consideration or as an integral aspect of membership in an enterprise engaged in racketeering. It is similar to a provision contained in S. 2572 as passed by the Senate in the 97th Congress. Part A consists of two sections; the first defines the term "crime of violence", used here and elsewhere in the bill, while the second creates new offenses and additional definitions.

The offenses set forth in this Part are related but distinct. The first is limited to murder and punishes the travel in interstate or foreign commerce or the use of the facilities of interstate or foreign commerce of the mails, as consideration for the receipt of anything of pecuniary value, with the intent that a murder be committed. The second extends to murder, kidnapping, or serious assault committed for anything of pecuniary value or for the purpose of gaining entrance into or maintaining or increasing one's position in an organized crime group.

With respect to the first offense, the Committee is aware of the concerns of local prosecutors with respect to the creation of concurrent Federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of

State and local authorities.[1] However, the Committee believes that the option of Federal investigation and prosecution should be available when a murder is committed or planned as consideration for something of pecuniary value and the proper Federal nexus, such as interstate travel, use of the facilities of interstate commerce, or use of the mails, is present. This does not mean, nor does the Committee intend, that all or even most such offenses should become matters of Federal responsibility. Rather, Federal jurisdiction should be asserted selectively based on such factors as the type of defendants reasonably believed to be involved and the relative ability of the Federal and State authorities to investigate and prosecute. For example, the apparent involvement of organized crime figures or the lack of effective local investigation because of the interstate features of the crime could indicate that Federal action was appropriate. On the other hand, the Committee fully appreciates that many State and local police forces and prosecutors offices are quite capable of handling a murder for hire case notwithstanding the presence of some interstate aspects and regardless of the criminal backgrounds of the defendants. Cooperation and coordination between Federal and State officials should be utilized to ensure that the new murder-for-hire statute is used in appropriate cases to assist the States rather than to allow the usurpation of significant cases by Federal authorities that could be handled as well or better at the local level.

With respect to the second offense set out in Part A, the Committee concluded that the need for Federal jurisdiction is clear,

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1. See Crime Control Act Hearings (statement of the National District Attorney's Association, p. 27)

in view of the Federal Government's strong interest, as recognized in existing statutes, in suppressing the activities of organized criminal enterprises, and the fact that the FBI's experience and network of informants and intelligence with respect to such enterprises will often facilitate a successful Federal investigation where local authorities might be stymied. Here again, however, the Committee does not intend that all such offenses should be prosecuted federally. Murder, kidnapping, and assault also violate State law and the States will still have an important role to play in many such cases that are committed as an integral part of an organized crime operation.

New Jersey Statutes Annotated

N.J.S.A. 2C:11-3. Murder

a. Except as provided in section 2C:11-4, criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death

of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b. Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

c. Any person convicted under subsection a. (1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment

or promise of payment of anything of pecuniary value shall be sentenced as provided hereafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section.

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. Nothing in this subsection shall be construed to prevent the participation of an alternate juror in the sentencing proceeding if one of the jurors who rendered the guilty verdict becomes ill or is otherwise unable to proceed before or during the sentencing proceeding.

(2)(a) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection but shall not have a burden with regard to the establishment of a mitigating factor.

(b) The admissibility of evidence offered by the State to

establish any of the aggravating factors shall be governed by the rules governing the admission of evidence at criminal trials: The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors. If the defendant produces evidence in mitigation which would not be admissible under the rules governing the admission of evidence at criminal trials, the State may rebut that evidence without regard to the rules governing the admission of evidence at criminal trials.

(c) Evidence admitted at the trial, which is relevant to the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection, shall be considered without the necessity of reintroducing that evidence at the sentencing proceeding; provided that the fact finder at the sentencing proceeding was present as either the fact finder or the judge at the trial.

(d) The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor.

(e) Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(f) Evidence offered by the State with regard to the establishment of a prior homicide conviction pursuant to paragraph (4)(a) of this subsection may include the identity and age of the victim, the manner of death and the relationship, if

any, of the victim to the defendant.

(3) The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b.

(4) The aggravating factors which may be found by the jury or the court are:

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether is on appeal;

(b) In the commission of the murder, the defendant purposely

or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping; or

(h) The defendant murdered a public servant, as defined in N.J.S. 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental

or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

d. The sentencing proceeding set forth in subsection c. of this section shall not be waived by the prosecuting attorney.

e. Every judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the

sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In any instance in which the defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.

f. Prior to the jury's sentencing deliberations, the trial court shall inform the jury of the sentences which may be imposed pursuant to subsection b. of this section on the defendant if the defendant is not sentenced to death. The jury shall also be informed that a failure to reach a unanimous verdict shall result in sentencing by the court pursuant to subsection b.

g. A juvenile who has been tried as an adult and convicted of murder shall not be sentenced pursuant to the provisions of subsection c. but shall be sentenced pursuant to the provisions of subsection b. of this section.

Amended by L. 1985, c. 178, Section 2, eff. June 10, 1985; L. 1985, c. 478, Section 1, eff. Jan. 17, 1986.

APPENDIX C — EXCERPTS FROM TRIAL TRANSCRIPTS BEFORE HON. NICHOLAS H. POLITAN, J.U.S.D.C.

[Commencing at Volume 10, page 162]

. . . should not consider that issue.

The defendant asserts, however, that she was unusually susceptible to suggestion and entrapment, and expert testimony, as well as other testimony and evidence in this case may or may not assist you in considering that issue. Again, the determination of the facts in this case, including the defendant's mental state at the time of the offenses, rests solely with you.

Now I will charge you on the law pertaining to using interstate facilities of commerce or the mails with intent that a murder be committed in exchange for the payment of money, which is the offense charged in the indictment in this case.

First I will review the indictment, which consists of seven counts. In six of those counts, counts 1, 2, 4, 5, 6 and 7, all have the same language and the same charge. I will read count 1. On or about February 11, 1988, at approximately 9:53 p.m., in Passaic County, in the District of New Jersey and elsewhere, the defendant, Geraldine S. Koven, did knowingly and wilfully use and cause another to use a communication facility in interstate commerce, that is, a digital paging device beeper, which was activated by a telephone call from New Jersey, causing electronic signals to be transmitted by wire to various locations in New York and New Jersey and radio signals to be broadcast simultaneouly from New York and New Jersey, with intent that a murder be committed, in violation of New Jersey [163] statutes 2C:11-3 and other state law, as consideration for a promise and agreement to pay money, in violation of Title 18 U.S. Code Section 1952(a).

Appendix C

The same charge is made in count 2, except the date is February 12, 1988 and the time is 9:04 p.m.

The same charge is made in count 4, except the date is February 16, 1988 and the time is 9:35 a.m.

The same charge is made in count 5, except the date is February 16, 1988 and the time is 6:15 p.m.

The same charge is made in count 6, except the date is February 17, 1988 and the time is 3:15 p.m.

The same charge is made in count 7, except that the date is February 19, 1988 and the time is 9:15 a.m.

In addition to those counts, in count 3 there is a charge involving the U.S. mail, and I will read that to you, that on or about February 13, 1988, at Paterson, in the District of New Jersey and elsewhere, the defendant Geraldine S. Koven, did knowingly and wilfully use the United States mail in that the defendant mailed and caused to be mailed from Paterson, New Jersey an envelope addressed to Photo River Survey, P.O. Box 38, New Rochelle, New York, 10804, with intent that a murder be committed in violation of New Jersey statute 2C:11-3 and other state laws, as consideration for a promise and agreement to pay money, all in violation of Title 18 United States Code, section 1952.

[164] Those are the seven charges that you are going to have to decide upon in this case and render a verdict on.

The statute embodying the crime charged in the indictment is found in Title 18 United States Code section 1952(a) which states in relevant part, "Whoever uses or causes another to use

the mail or any facility in interstate commerce with intent that a murder be committed, in violation of the laws of any State or of the United States, as consideration for the receipt of or as consideration for a promise or agreement to pay anything of pecuniary value, shall be guilty of an offense against the laws of the United States."

Under the statute that I just read to you, anything of pecuniary value means, among other things, money. The term facility in interstate commerce includes means of communication. The word interstate means between or affecting two or more states. The government alleges in this case that the use of a telephone transmitting an electronic signal to a beeper through facilities in both New Jersey and New York is such an interstate means of communication. The word consideration used in the statute means the inducement to a contract or, in other words, the cause, motive, price or influence which caused one party to contract with another.

All counts in the indictment, as I indicated to you, except count 3, charge use of an interstate communication facility, namely a beeper, with intent that a murder be [165] committed in exchange for money.

Four essential elements are required to be proved in order to establish the offense charged in those counts: first, the defendant used or caused another to use an interstate means of communication; second, that the use of the interstate means of communciation was with the intent that a murder be committed in violation of a state or federal law; third, that a murder would be committed as consideration for the receipt of money or promise or agreement to pay money; and, fourth, that the defendant acted knowingly and wilfully.

Appendix C

Count 3 of the indictment charges use of the mail with intent that a murder be committed in exchange for money. Again, four essential elements must be proved to establish that offense. First, that the defendant used or caused another to use the mail; second, that the use of the mail was with intent that a murder be committed in violation of state or federal law; third, that the murder would be committed as consideration for the receipt of money or a promise or agreement to pay money; and, fourth, that the defendant acted knowingly and wilfully.

The government must prove that the defendant committed the offense knowingly and wilfully. Knowingly means with knowledge, that is voluntary and intentionally, and not because of a mistake or an accident or another innocent reason. An act is done wilfully if it is done voluntarily and intentionally, with specific intent to do something the law forbids or with the. . . .

[Commencing at Volume 12, page 18]

. . . agree that this was, although the record is not clear as to it. I think fairness dictates that I agree that this was probably a beeper that he normally used or normally had. He may have had several beeper numbers. He didn't go out and get a beeper number just for the Geraldine Koven case. No. I don't have a problem with that.

THE COURT: This Court is satisfied and it will decide the motion right now. The Court will deny the motion, whether you view it as a motion to dismiss for prosecutorial misconduct or viewed as a motion to entrap into federal jurisdiction, or viewed as a motion for acquittal or viewed as a motion for a new trial, or viewed as a motion for an evidentiary hearing. I'm satisfied that the allegations concerning the use of the beeper in this case

do not rise to the dignity of the prosecutorial misconduct as outlined in United States versus Archer, 486 F. 2d, 670. A Second Circuit case, 1973.

I might add that U.S. versus Archer is rather sui generis. There are no other cases that seem to apply that doctrine.

But, in any event, in this case it is clear to me as a matter of fact, A, that Agent Schenck used this beeper in connection with his normal FBI duties and it was used in connection with the investigation. And if my recollection of the testimony is correct, he used a beeper in connection with his FBI duties so as not to have people call his personal home.

[19] Also, he could have messages on that were he away from his station on duty doing other things, and it was just normal and usual for him to do it.

The fact there is a beeper in this case that creates federal jurisdiction is just the way the facts came down. It had nothing to do with prosecutorial action or misconduct of any kind or nature.

As such, I will deny the motion. Nor do I find anything in the case law to support a theory of entrapment into federal jurisdiction. I don't known of that doctrine. Maybe it exists some place in a university.

MR. A. GALLUCCIO: Called manufactured jurisdiction. Not entrapment as a matter of law.

THE COURT: Manufactured jurisdiction?

MR. A. GALLUCCIO: Right.

THE COURT: Thank you. I've already indicated insofar as manufactured jurisdiction is concerned. I want to make the record clear that I know of no entrapment into federal jurisdiction. And were I to rule that — if there were such a doctrine, I find as a matter of fact there was no entrapment into federal jurisdiction in this case. Any other matters that have to be tended to before we have to get on to sentencing?

MR. ASHRAFT: No.

THE COURT: Gentlemen, this is a sentencing that is going to be done pursuant to the new guidelines. As such, as I [20] understand it, the Presentence Report prepared by the Probation Department has been given to both the United States Attorney and defense counsel for their reading, study and analysis. I understand from the Presentence Report there is no objection to the factual statements contained in the presentence investigative report.

Is that so?

Mr. Ashrafi, first?

MR. ASHRAFI: Yes, it is.

THE COURT: Mr. Galluccio, is that so?

MR. A. GALLUCCIO: If the Court please, there are no objections to the particular positions that are taken. However, I don't think this is a problem at all. Except that there are, of course, assertions by Mr. Koven and the government that

Geraldine Koven does not agree with.

But I've explained to Mrs. Koven that you, in fact, presided over the trial, had the opportunity to hear all the testimony. And the factual assertions that she disagrees with I explained to her that the government has a right to have their own contention, whether it agrees with hers or not.

So to that extent, there is a disagreement as to certain factual assertions.

THE COURT: Okay. Let me start all over with you. I want to make it clear. I don't want to create issues that people on appeal are going to say were not handled by the Court [21] below.

Are all of Mrs. Koven's factual assertions contained in the Presentence Report to her satisfaction?

MR. A. GALLUCCIO: Yes.

THE COURT: Are all her responses to what she perceives to be misstatements by her husband and the government in the Presentence Report?

MR. A. GALLUCCIO: Yes. Those are in the Presentence Report. She doesn't agree with them, but they're there.

THE COURT: Do you on behalf of the defendant desire any further hearing on those factual matters or are you prepared to rest on the factual statements as contained in the Presentence Report, albeit the favorable ones as well as the unfavorable ones?

MR. A. GALLUCCIO: We are prepared to rest upon what is in the Presentence Report.

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THE COURT: It adequately sets forth Mrs. Koven's position as to the factual basis; correct?

MR. A. GALLUCCIO: Yes.

THE COURT: All right. That being the case and there being no objection to the factual statements contained in the presentence investigative report, this Court adopts these statements as its findings of fact in this sentencing procedure.

Now, what about the application of the guidelines to the facts? Have both counsel reviewed those guidelines?

[Commencing at Volume 12, page 34]

. . . law. What was said was said. The government made a misstatement of the law when it said that a court can consider a person who pleads guilty, as to whether or not a point reduction takes place.

That is clearly not the law. Guideline 1.1 C specifically says a defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right, the fact that you plead guilty.

THE COURT: But I can take it into consideration. It is a matter of discretion.

MR. A. GALLUCCIO: No, you can't.

THE COURT: Oh.

MR. A. GALLUCCIO: I'll tell you why you can't.

Appendix C

THE COURT: I disagree.

MR. A. GALLUCCIO: The rationale —

THE COURT: I disagree with you, Mr. Galluccio. Don't argue it.

MR. A. GALLUCCIO: Then you're punishing somebody for going to trial.

THE COURT: It is not your case.

MR. A. GALLUCCIO: Okay.

THE COURT: It is not your case. I disagree agree with you.

MR. A. GALLUCCIO: Okay.

THE COURT: The Court has heard the objections — the [35] very specific objections to the adjustment for acceptance of responsibility criteria in the Presentence Report as outlined in paragraphs 29 and 30 and is satisfied that the conclusions made by the probation officer in this instance were justified under all of the facts. And, therefore, the Court adopts those factual statements in the Presentence Report as are contained in Paragraph 29 and 30 as this Court's determination.

This Court has lived with this case since it's very beginnings. And at no point at any time did the defendant ever accept responsibility for her actions. Notwithstanding the clarity with which her voice appeared on the various taped conversations, notwithstanding the clarity with which her body appeared on the videotapes as she placed the money to be paid to the agent to

kill her husband in a vehicle. And she has never retreated from the position that this is all the fault and blame of her husband.

I'm satisfied that there has been no adjustment for acceptance of responsibility in this instance. And I will, therefore, adopt paragraphs 29 and 30 as my own. I will make no reduction in the base offense level of 23.

Accordingly, I find that that is the appropriate level in this case. Okay.

MR. A. GALLUCCIO: Well —

THE COURT: That being so, I'm ready to hear from you.

MR. A. GALLUCCIO: Your Honor, you also asked me if [36] there was anything else in the Presentence Report.

THE COURT: Yes.

MR. A. GALLUCCIO: I don't know if this is the appropriate time. But merely, under 92, under the departure, do I do that now before your Honor? Would you like me to do it as part of my —

THE COURT: Can I make a suggestion to you?

MR. A. GALLUCCIO: Yes. I can incorporate it?

THE COURT: In view of the fact this is new to all of us, these guidelines, we feel our way a wee bit.

MR. A. GALLUCCIO: Right.

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THE COURT: The guidelines insofar as factors that may warrant departure, I would specifically want you to address those.

MR. A. GALLUCCIO: Okay.

THE COURT: Because there may be aggravating circumstances in here of a kind which would warrant my going upward from the guidelines. In particular, I'm interested in your comments concerning Mrs. Koven's disregard for a second person and the possible murder of a second person. I'm also interested in determining whether or not the kind of offense that we're talking about, while the statute speaks of a number of offenses, here we're talking about murder. Whether or not that is or is not an aggravating circumstance.

Why don't we interrupt this. I'll get rid of my jury.

[Commencing at Volume 12, page 41]

. . . increase the crime for which she is being charged; namely, murder for hire. How high can you go? Murder for hire. But for two people — I expect that it is a situation where it is a matter of judgment in terms of — as with most of these are. But in terms of what may be a substantial increase of a particular crime to one person may not be to another.

I just don't — I have to believe that when the guidelines were set they took into consideration many factors for a person who is convicted for a murder for hire, many factors are factored into that. To say that that one was not, I cannot tell.

I just don't believe that it is substantial enough in order to increase the punishment to go beyond the guidelines here. But

I agree an argument could be made for it.

I would like to address the mitigating —

THE COURT: Go ahead, please.

MR. A. GALLUCCIO: Has the Court examined those?

THE COURT: I want to examine everything. You know, with me I bring you to things that I'm focusing on.

MR. A. GALLUCCIO: I know that.

THE COURT: I want to get your thinking on it.

MR. A. GALLUCCIO: I appreciate that, Judge. I was going to mention to the Court in terms of the guidelines that should be used as mitigating factors to depart from the normal punishment, to lessen it, are two factors which were not [42] considered when they gave the presumptive terms here in the sentences. That is Chapter 5, Part K 2.10.

That one is victim's conduct. If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the Court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the Court should consider — and then there is A through E.

I submit that, A: The size and strength of the victim or other relevant physical characteristic and comparison with those of the defendant and, C, the danger reasonably perceived by the defendant including the victims reputation for violence and, E,

any other relevant conduct by the victim that substantially contributed to the danger presented.

Those three, although two of them probably more appropriately are to be used in a self defense type of situation where the defense falls short for some reason but those facts are involved.

But I think that if you take the three of them in their totality, in conjunction with the facts in this case, as I believe the evidence has shown, namely, that the defendant — the relevant conduct by the victim that substantially contributed to the danger presented.

That is where that battered woman syndrome comes into play. And I never contended it rose to the level of a defense. [43] Never contended that at any stage in the case. Obviously, falling short of a mental disease or defect or an insanity defense. However, her perception of her husband and all the years of physical abuse, mental abuse, the torment, the infidelity.

All of these things, in addition to how her children approached the situation and their opposition to their father. The fact they they related to this mother in a situation like this. Irv Koven's conduct during the years preceding doesn't rise to the level of a defense. I never suggested it did.

Nor do I insult the intelligence or integrity of this Court to say, well, that is an excuse for you to go out and want someone murdered. I'm not suggesting that.

We're not talking in terms of defense today. We're talking in terms of mitigation. This is not a situation — and perhaps it could be argued by someone else, although I think the record

is more on my side of this issue — that if someone is going to collect 500,000 or a million dollars insurance and kills somebody, well, you can't really raise this argument.

Now, its suggested in this case —

THE COURT: Well, let me tell you something. There is no question that greed rears its ugly head throughout this case. Every act that Mrs. Koven did was designed to get the money, get the money, get the money.

How about when she had her children go and pick up the [44] garbage cans at her husband's place to prove how much money he had? How about the alleged hundred or 200 or $300,000 that she had buried some place that no one seems to be able to put their finger on?

MR. A. GALLUCCIO: I disagree with your conclusion. They're all wrong and not established by the facts.

THE COURT: Mr. Galluccio, let me finish.

MR. A. GALLUCCIO: Don't you look at the other facts?

THE COURT: Let me finish.

MR. A. GALLUCCIO: I thought I was talking.

THE COURT: I want to tell you what was on my mind.

MR. A. GALLUCCIO: Sorry.

THE COURT: There is nothing but greed in this case. There

is no battered woman. Battered woman was battered a year before these events occurred. Battered in a year —

MR. A. GALLUCCIO: A year and a half.

THE COURT: Year and a half.

Number two, all we had was a knock-down, drag-out matrimonial proceeding.

And I daresay, if everyone in a knock-down embattled matrimonial proceeding were to go out and either kill or contract to kill his or her respective spouse, we'd have no law and order in the country.

MR. A. GALLUCCIO: Would you look at it this way? I could see how one could look at it this way. Would you look at [45] it this way?

The extent to which Irv Koven reduced his entire family — not only Geraldine Koven. He reduced the two children to snooping in their garage to find out where the money he was hiding with him and his paramour. He reduced his family to this.

If you want to say that Schuyler and if you want to say that Debra are just as guilty as their mother — you know what it takes, Judge, to have your own two children turn against you. To have your own children snooping through garbage because they don't feel you're supporting them.

Do you think for the 25 years that Debra was alive — she may not have the best personality in the world or Schuyler for his 19 years — do you know what it takes for children to turn

against their father and be on the side of their mother in the context of this nature?

I submit to you it took 18 and 25 years of complete dissatisfaction and complete disassociation by him and estrangement from them.

THE COURT: Mr. Galluccio, prior to my assuming the bench I did a fair amount of matrimonial work. I daresay it is not unusual in the matrimonial area to see children going against fathers, to see children going against mothers, or to see children siding one side or the other or seeing children split one side and the other. It is a garden type variety [46] matrimonial dispute involving money.

MR. A. GALLUCCIO: I disagree. It did involve money. It did involve finances. But it dealt with a lot more than that. The psychiatrists, no matter how they lined up in this case, they all did, in fact, clearly, I think, indicate that there was something to the battered woman syndrome. All right.

It is a concept that we really can't relate to. It is something new. Perhaps it is a catch-all and it's the last refuge of a scoundrel when nothing else is available to defend yourself with.

The point is forget what we label it. I don't want to call it battered woman. I don't want to call it anything. I want to call it what it is, in fact. The woman — it is uncontradicted in this case — as a matter of fact, it is corroborated by not only her. It is corroborated by her two children.

You remember the testimony. She was beaten for years. So she wasn't beaten for a year and a half. The physical harassment

ceased or the physical abuse ceased. The mental abuse took its place through the slashed tires.

Sure, he didn't punch her. He didn't hit her. Even if he didn't do those things, she perceived, Judge, in that year and a half that he wasn't physically beating her, where she had to hide in the closet with her kids — she perceived it as he continued the slashing of the tires. That is just like taking a [47] rock and hitting her in the head with it. That's the same type of physical abuse. We call it mental abuse. That continued up until the day that she met with Schenck and Larry Nelson.

But, more importantly, and again I have to keep reminding myself and perhaps the Court I'm not here — I abhor the offense. Any reasonable person abhors the offense. Who could stand here and justify that you want to kill somebody? I don't disagree with that.

I'm talking about — when we're talking about mitigation of punishment, that is what we're here for today. We already judged the sin. What I'm suggesting to the Court here is that this is a possibility because of the facts of this case as they developed, although it didn't rise to the level of an offense, it also may be used — I tried. I'll include both in one.

The diminished capacity, one which is 5K 2.13 where that is really for nonviolent offenses which technically this is not a violent offense, technically, but I could agree with logic and reason it clearly is.

But it doesn't — that is, diminished capacity are those situations where a person's mental status doesn't rise to the level of an offense. However, it should be taken into consideration

that it may provide some mitigation in terms of the punishment.

THE COURT: Let me tell you my problem in that regard.

[Commencing at Volume 12, page 73]

MRS. KOVEN: No. I haven't, your Honor.

THE COURT: In the last two years?

MRS. KOVEN: No.

THE COURT: Okay.

MRS. KOVEN: The gifts to my children go back to 1981, 1982, 1983. They were from my father for myself. That was money given to me by my father, which all can be substantiated.

But it still doesn't explain my role in this crime nor does it excuse it. I'm only trying to bring before the Court what my state of mind was. The torment that I was through. The overburdening of my circuits, so to speak. If I had the capacity to rectify all the events of the last 12 months, I would give all in that effort.

THE COURT: Do you accept responsibility for the crime?

MRS. KOVEN: I certainly do, your Honor. It was my voice on those tapes. It was my participation in this fantasy that was created. I walked right into it with my eyes opened. Why I did it, I have no idea.

It didn't make any sense. There was to be no financial benefit

to me or the children. The cases that I studied in my family law courses indicated in the 18-month period of time the estates were separate and distinct.

THE COURT: Isn't there contained in the tape, Mrs. Koven, an indication that your wanted this job done, this murder committed, before the next court date of your matrimonial case?

[74] MRS. KOVEN: That is correct, your Honor.

THE COURT: So it had something to do with it, I assume.

MRS KOVEN: Well, you know, they say when the devil knocks on the door and you answer, you're never the same.

THE COURT: I don't know what that means?

MRS. KOVEN: What it means, your Honor, is I cavorted with the devil, Okay? Fantasy was created. And I fell right into it. I went in with my eyes on.

I began to want what I thought would be a solution. But it served no purpose. There was no sense in it. When you talk about it logically, where was the sense in it? I was to not benefit in any way.

I was presented with Mr. Nelson's statements to me. "You don't have to go through this. I can help you. I can get you through this."

I won't say that I wasn't attracted to the man. He cared for my kids. He helped with the cars. He took the time to talk with my son. To me that was the most attractive point about him.

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I can tell you that if I could have done anything now or in the past 12 months to have eliminated the agony that my children were forced to endure, the arrest, the trial, the horror of it all, to think that their mother could have perpetrated such a thing, I'd give it all. The agony that we [75] all experience when they visit me there at the institution; I can't tell you what that horror is like.

I brought them through the agony of their home life. Even backing on the driveway, even at the time that I was arrested. The contradictions are tantamount and they don't make any sense. And I have no explanation of why I fell into this. It is inexcusable, but I was described as a pillar of strength. Someone for others to lean on and to seek help from. And I did that. I helped them.

But I, too, as pillars do, deteriorated. I compromised myself into an illogical, inexusable act. I was struggling in pursuit in a marriage for an unattainable goal. I wanted to duplicate the comfort and peace that I knew as a child for my children. I wanted to cherish and I wanted to be cherished. I truly fell apart here, your Honor. I wasn't strong enough to think clearly or logically.

My children, even today, are experiencing this same pain. I'm lucky because I've been brought out of it with only my own destruction. None of it made any sense. Because I know I could not have had any peace it if had happened and that, too, would have been my own undoing.

I can only ask the Court to apply whatever justice you can with whatever mercy you can muster.

Thank you.

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THE COURT: Anything further, Mr. Galluccio?

[76] MR. A. GALLUCCIO: No.

THE COURT: The hardest job for someone sitting in this position is to sentence someone in connection with a criminal matter. It's very easy for this Court to accept the judgment of the jury in a case where money is involved, in a case where rights are involved, in a case where obligations are involved. It is the hardest job to sit here in judgment upon another human being. And knowing that when you make that judgment, you are reshaping that individual's life; that you will have an impact on that individual for the rest of his or her natural life no matter what your decision is. It is a hard decision, but it goes with the territory. It goes with the job and the buck stops here. That is what we have to do.

We have to sentence you today. So far as this Court is concerned, the most precious thing that exists is life, itself. We can replace money. We can replace property. We can replace houses. We can even replace parts of bodies, thanks to medical science. But we cannot recreate what is created in the first instance; life itself. And the Court will not toy with or treat life lightly, the concept of life.

We have in this case — and the tapes are unequivocal. They are clear. They are convincing. They are beyond the shadow of a doubt that the defendant in this case plotted to kill and sought someone to kill her husband, to take life itself.

[77] This was not slashing of a tire. This was not burning a building. This was not stealing money. This was killing. Taking the life of a human being. Something which cannot be replaced.

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This Court feels under those circumstances it is a very, very sensitive area, a very substantial area and something which must be dealt with accordingly.

The tapes leave this Court without the shadow of a doubt that the defendant knew what she was doing, did it, carried through on it. And when told of the horrible death which never occurred, thank God, of her husband by the agent, her only reaction at that point was not remorse, sorrow, or a tinge of anything. It was: "I haven't been notified yet."

When the agent titillated her to come out to get something that she would want, that it was an important thing for her to get, she still followed through and came out looking to get the last piece of whatever it was, whether it be a ring from the dead man's body or his wallet or his driver's license or some other indicia of his death. She went to look for it.

It was a very bitter matrimonial case, and whatever it is it is. But it's not before this Court. This Court expresses no judgment on it. This Court is satisfied that under the circumstances it must impose a sentence as follows:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Geraldine Koven, [78] is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 57 months. This term consists of 57 months on each count to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of two years. This term consists of terms of two years on each count to run concurrently.

While on supervised release the defendant shall not commit

another federal, state or local crime; shall comply with the standard conditions that have been adopted by this Court and shall comply with the following special conditions:

One, that the defendant participate in a mental health program approved by the United States Probation Office;

Two, that the defendant have no contact with her husband, Irvin Koven, without prior notification to the probation office.

A special assessment of $50 is hereby imposed on each of the seven counts for a total of $350.

That is the judgment of this Court.

Anything further, gentlemen?

MR. A. GALLUCCIO: I will not be representing the defendant in any appeal, your Honor. The defendant requests that the clerk file a Notice of Appeal for her pursuant to court rule.

THE COURT: Excuse me.

APPENDIX D — MATERIALS RELATING TO SENTENCING PROCEEDINGS

REPORT OF STATEMENT OF REASONS FOR IMPOSING SENTENCE FOR THE DISTRICT COURT OF NEW JERSEY, PAGES 1 AND 4

CRIM. NO. 88-00049-01

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

v.

GERALDINE KOVEN

REPORT OF STATEMENT OF REASONS FOR IMPOSING SENTENCE

I. FINDINGS OF FACT

[X] There being no objections to the factual statements contained in the presentence investigation report (PSI), the Court adopts these statements as its findings of fact.[1]

OR

* * *

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1. Because material in the PSI adopted or incorporated by reference arguably becomes part of the public record, it would appear to be the better practice to attach the adopted portions of the PSI to this form. However, information that, if revealed, would endanger the defendant or others, was obtained under an express promise of confidentiality or would violate a statute, should be made part of a nonpublic record. See *generally*, Rule 32(c) (3) (A).

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[X] A question of guideline application has arisen with respect to the conclusion(s) contained in paragraph(s) 29 and 30 of the PSI. The court resolves the question(s) as follows:

The question arose at sentencing, that the defendant should be entitled to a two-level reduction for acceptance of responsibility.

The Court adopted the PSI as stands. There is no reduction in Base Offense Level 23; the defendant is not entitled to a 2 point reduction.

The Court determines that the applicable guidelines are:[5]

Total Offense Level: 23

Criminal History Category: 1

46 to 57 months imprisonment[6]

$10,000 to $100,000 fine (plus cost of imprisonment/supervision)

$N/A restitution

$50 special assessment on each of the 7 counts, for a total of $350.

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5. You may attach a Sentencing Guideline Worksheet (reflecting any findings and guideline application rulings made at the sentencing hearing) in lieu of (or in addition to) completing this portion of the form.

6. *See* n.4, *supra*.

Appendix D

PRESENTENCE REPORT FOR THE DISTRICT COURT OF NEW JERSEY, PART A, THE OFFENSE CONDUCT, PARAGRAPHS 23-32

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Docket No. 88-00049-001

UNITED STATES OF AMERICA,

v.

GERALDINE SUSAN KOVEN

PRESENTENCE REPORT

Prepared for:	The Honorable Nicholas H. Politan United States District Judge
Prepared by:	Maurine Rush-Blossfeld United States Probation Officer (201) 645-6161
Sentencing Date:	July 21, 988 [sic]
Offense:	18 U.S.C. 1952A, Use of Interstate Commerce Facilities in the Commission of Murder for Hire (Counts 1-7)

Appendix D

Release Status:	Currently detained at the Metropolitan Correctional Center New York, New York
Identifying Data:	
Date of Birth:	January 19, 1943
Social Security Number	099-34-1671
Address:	9 Clifford Drive Wayne, New Jersey
Detainers:	None
Codefendants:	None

Assistant U.S. Attorney	Defense Counsel
Victor Ashrafi 970 Broad Street Newark, NJ 07102 (201) 621-2716	Adolph Gallucio 9 Colt Street Paterson, NJ 07505 (201) 278-0600/742-1077

Dated report prepared: June 21, 1988
Revised: July 15, 1988

23. Koven is described by the Government as having led an affluent lifestyle, which was compromised by her husband's changing jobs in 1984. The change in the family's financial means apparently caused friction, and Koven is said to have opened up several bank accounts under fictitious names and Social Security numbers in order to hide her financial assets. When Koven

obtained the restraining order on March 10, 1986, the Government also notes that she shrewdly froze her husband's assets as well, while emptying the corporate safe deposit box of some $140,000 bearer bonds, $36,000 in cash and assorted jewelry. In addition, she allegedly transferred some $150,000 in securities to her daughter's name. The government contends that by late 1987, Koven may have hidden some $300,000 in assets and in December, 1987, the Court ordered her to reveal her assets, setting a trial date of February 25, 1988, the period which coincides with the instant offense. At the time when she contacted Larry Nelson to secure a "hit man", the Government contends that Koven was frustrated by the divorce dispute, the loss of her seventh attorney, and by her daughter moving out of the house. The Government contends that the defendant's shrewd financial maneuvering and calculated actions through the marriage are inconsistent with the "battered women's syndrome", but rather reflective of a calculating individual who coldly and maliciously plotted the murder of her husband.

24. The intended victim in this offense, Irven Koven, was interviewed in the course of this investigation. Mr. Koven reflected on the events leading to the instant offense, acknowledging a tumultuous marital history of some twenty years' duration. Though he does not deny that he used physical force upon his wife in "two or three incidents", he contends that these were in self-defense against his wife, who frequently attacked him. Koven claims that his wife would erupt into "violent moods" for trivial matters, and that she frequently attacked him with knives, food and other things, once stabbing him in the leg with a knitting needle. He contends that his wife is brilliant and "underhanded", and that her complex financial machinations in an effort to usurp economic control in the marriage, are still being disentangled by his lawyers.

25. He adamantly denied that his wife was ever a victim, but describes her as "cold and calculating" with a vindictiveness which played itself out through the matrimonial history.

26. It is noted that Koven described the children as "pawns" to his wife and contended that they share a conspiratorial spirit with his wife. He expresses fear and outrage at the possibility of the intended murder of him and his girlfriend, asserting that the experience has been "traumatic" to his personal and professional life. He cites the fact that even his employees have become fearful.

27. Mr. Koven expresses his continuing anxiety that his wife's lack of remorse may indicate that she continues to harbor murderous intentions toward him. He fears the ramifications of her meeting more sinister personalities in the custodial setting, or his children's fierce and blind loyalty, which may cause them to hire someone upon instructions from their mother. Mr. Koven concluded with the assertion that he feels his wife would benefit from intensive psychotherapy to address her feelings of anger and hostility, and her compulsion to attain money.

Adjustment for Obstruction of Justice

28. The Probation Officer has no information suggesting that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

29. Though the defendant does not dispute her involvement in this offense, she transfers the blame to others, including the victim himself, whom she suspects of having engineered the offense or conviction. She accepts no personal moral responsibility for

the potential consequences of her actions, and has exhibited no signs of remorse to this Officer.

30. In view of these facts, the defendant is not entitled to the two point reduction.

Offense Level Computation

31. Because the seven counts represent related offense conduct and because the counts involve more than one act connected by a common objective and victim, the counts are grouped into a single count, 3D1.2(b).

32. Base Offense Level: The guideline of 18 U.S.C. 1952(a) offenses is found in Section 2E1.4(a)(1) of the Guidelines. The base offense level is *23*.

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FEDERAL SENTENCING GUIDELINES MANUAL

Section 2E1.4. *Use of Interstate Commerce Facilities in the Commission of Murder for Hire*

(a) Base Offense Level (Apply the greater):

(1) 23; or

(2) the offense level applicable to the underlying unlawful conduct.

Commentary

Statutory Provision: 18 U.S.C. Section 1952A

Application Notes:

1. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.

2. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (*i.e.*, 23), the alternative minimum base offense level is to be used.

Background: The statute does not require that a murder covered by this section has been committed. The maximum term of imprisonment authorized by statute ranges from five years to life imprisonment.

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Part E — Acceptance of Responsibility

Section 3E1.1 *Acceptance of Responsibility*

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

Commentary

Application Notes:

1. In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:

(a) voluntary termination or withdrawal from criminal conduct or association;

(b) voluntary payment of restitution prior to adjudication of guilt;

(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;

(d) voluntary surrender to authorities promptly after commission of the offense;

(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(f) voluntary resignation from the office or position held during the commission of the offense; and

(g) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilty (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

3. A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section.

4. An adjustment under this section is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice (*see* Section 3C1.1), regardless of other factors.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation.

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Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse.

The availability of a reduction under Section 3E1.1 is not controlled by whether the conviction was by trial or plea of guilty. Although a guilty plea may show some evidence of acceptance of responsibility, it does not automatically entitle the defendant to a sentencing adjustment.

Appendix D

2. GENERAL PROVISIONS

Section 5K2.0 *Grounds for Departure* (Policy Statement)

Under 18 U.S.C. Section 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court fails "that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision, cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (*e.g.*, as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus,

disruption of a governmental function, Section 5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

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Section 5K2.10 *Victim's Conduct* (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

Appendix D

Section 5K2.13 *Diminished-Capacity* (Policy Statement)

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

APPENDIX E — ORDER OF THE SUPREME COURT OF THE UNITED STATES EXTENDING TIME FOR FILING

SUPREME COURT OF THE UNITED STATES

No. A-744

Geraldine Koven,

Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 20, 1989.

s/ Wm. J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 20th
day of March, 1989.